86-901

NO. _____

Supreme Court, U.S.
FILED
DEC 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

LARRY COHRAN,

Petitioner,

vs.

HERBERT A. RIVERS, Solicitor State Court of Cobb County, DAVID ANTHONY, BOB CANADA, and J. LYNN RAINEY,

Respondents.

ON WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' STATEMENT REGARDING QUESTION PRESENTED FOR REVIEW

Respondents contend that this case presents no questions for review by this Court as the district court relied upon binding precedent from this Court and federal courts of appeals which are not in conflict with other courts of appeals. The Eleventh Circuit Court of Appeals, recognizing this, affirmed the ruling of the district court without opinion, pursuant to Circuit Rule 25.

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Federal Statutes

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is largely conclusory and argumentative and unsupported by the record. Respondent would refer the Court to that statement of the case set forth in the district court's order and included in Appendix "A" to the Petition at pages A1 through A5. That statement is complete and accurate and contains everything that is material to the consideration of this matter.

SUMMARY OF ARGUMENT

There is no reason to grant review on writ of certiorari in this case. The district court order granting summary judgment to the respondents, which was affirmed without opinion by the Eleventh Circuit Court of Appeals, was based upon binding legal precedent.

Petitioner's claims did not set forth a cause of action under 42 U.S.C. §1983, 42 U.S.C. §3789g or 42 U.S.C. §1985(2) or (3), and the district court properly exercised its inherent, discretionary power in granting the protective order.

ARGUMENT

I. CONSIDERATIONS GOVERNING REVIEW

Rule 17 of this Court, titled "Considerations Governing Review on Certiorari" provides litigants guidance as to reasons that will be considered by this Court in granting review on writ of certiorari.

Reasons applicable to this case would include:

> "When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Rule 17.1(a)

and

> "When a state court or a federal court of appeals has decided an important question of federal law which has not been, but

should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

Rule 17.1(c)

None of those reasons are present in this case.

II. THE ELEVENTH CIRCUIT'S AFFIRMANCE DID NOT CONFLICT WITH THE NINTH CIRCUIT

Petitioner argues that the Eleventh Circuit Court of Appeals, by affirming the district court without opinion, is in conflict with the Ninth Circuit Court of Appeals decisions in Rutherford v. City of Berkeley, 780 F.2d 1444 (9th Cir. 1986) and Mann v. City of Tucson, 782 F.2d 790 (9th Cir. 1986). In both of those cases, the Eleventh Circuit found that the state defendant's conduct was so egregious that it violated the plaintiff/victim's right to substantive due process. In each of these cases, the state defendants had clearly acted in an unlawful manner toward the victims. In Rutherford, police

officers had beaten the plaintiff without provocation. In Mann, police officers had conducted two unlawful searches of the plaintiff's residence.

In the instant case, the Petitioner alleges that:

> "[T]he actions of the defendants embarrassed, humuliated, intimidated, libeled and slandered him. He further allege[d] that the actions of the defendants constitute malicious use and malicious abuse of process. The Plaintiff also contends that [Defendant] Rivers used his office staff to investigate and spy upon him and that the defendants continuously communicated with the news media in an effort to damage his reputation."

September 25, 1985 Order of the United States District Court, Northern District of Georgia, Civil Action No. C83-303A, in Appendix to Petition for Writ of Certiorari at Page A5.

The district court found that the Complaint failed to state a cause of action under 42 U.S.C. §1983, as it merely alleged causes of action for libel, slander, invasion of privacy or damage to reputation.

The court went further to hold that even if the complaint had alleged that the defendants had deprived the petitioner of any of his rights without due process of law, a claim would not be stated under 42 U.S.C. §1983 because state law provides adequate remedies for such deprivations. (Appendix to Petition for Writ of Certiorari, page A7.)

The Petitioner did not argue to the district court or the court of appeals that the defendants' conduct violated his right to substantive due process, nor was there any reason for either of those courts to find a substantive due process violation. The alleged conduct of the defendants in the instant case fell far short of that found by the Rutherford and Mann courts. It follows that the Eleventh Circuit Court of Appeals was not in conflict with the Ninth Circuit in rendering its Order in this appeal.

III. 42 U.S.C. §3789g CREATES NO PRIVATE CAUSE OF ACTION

Petitioner argues that he had a cause of action under 42 U.S.C. §3789g for the alleged improper dissemination of his criminal record. Petitioner has failed to cite any authority for this argument, and Respondents submit that none exists, as this statute contains its own enforcement provision.

IV. THE PROTECTIVE ORDER WAS A PROPER EXERCISE OF THE DISTRICT COURT'S INHERENT POWERS

Petitioner argues that the Protective Order entered by the district court on June 14, 1984, (Appendix to Petition for Writ of Certiorari, pages 12 through 14) is an improper "Gag Order". A trial court has jurisdiction to enter protective orders and limit the use and disclosure of information obtained through discovery under its inherent "equitable powers . . . of

law over (its) own process, to prevent abuses, oppression and injustices." Gumbel v. Pitkin, 124 U.S. 131, 144, 8 S.Ct. 379, 31 L.Ed. 374 (1888). This is exactly what the district court did in 1984, when it entered this protective order, and no reason exists now to overturn that exercise of the court's inherent discretionary power.

V. THERE IS NO REASON TO RECONSIDER THE CONSTRUCTION OF 42 U.S.C. §1985

Petitioner asks the Court to reconstrue 42 U.S.C. §1985(2) and (3) so that it will apply to him.

Section 1985(2) applies where two or more persons have deterred a "party or witness in any court of the United States from attending court" or testifying, and thus it has no application to this action.

Section 1985(3), as construed by this Court, requires that "some racial,

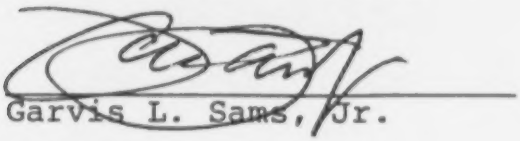
or perhaps otherwise class-based invidiously discriminatory animus (must lie) behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790 (1971). There is absolutely no reason to reconsider this construction of 42 U.S.C. §1985(3), which was followed by the Fifth Circuit Court of Appeals in Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978), the case relied upon by the district court in dispensing with this claim.

CONCLUSION

For the reasons set forth in the within and foregoing Brief in Opposition to Petition for Writ of Certiorari, this Court should deny the writ.

Respectfully submitted,

SAMS, GLOVER & GENTRY



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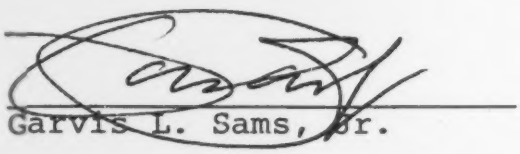
CERTIFICATE OF FILING AND SERVICE

This is to certify that I received the Petition for Writ of Certiorari on November 4, 1986, and that within thirty (30) days afer receipt of the petition, I have filed with the Clerk of this Court forty (40) printed copies of this opposing brief by depositing same in a United States post office, with first-class postage prepaid, properly addressed to:

Clerk of the Supreme Court
of the United States
1 First Street N.E.
Washington, D.C. 20543

This 4TH day of December, 1986.



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I have served one copy of this opposing brief on opposing counsel by depositing same in the United States mail, with first-class postage prepaid, properly addressed to:

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This 4TH day of December, 1986.

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